Supreme Court, U.S.
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No. 96-1428

In The

Supreme Court of the United States

October Term, 1996

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In an effort to reduce illegal consumption of alcohol by minors, Baltimore enacted an ordinance which restricts the placement of publicly visible alcohol advertisements. The questions presented are:

1. In determining the First Amendment constitutionality of a speech restriction on promotional advertising, may the reviewing court judicially notice the principle that promotional advertising increases consumption, and, if not, should the predictive judgments of the legislature supporting the restriction receive judicial treatment as adjudicative or legislative facts?

2. Is a restriction against publicly visible alcohol advertising in areas where children live, attend school, and engage in recreation, more extensive than necessary to achieve the governmental purpose of reducing illegal alcohol consumption by minors?

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BRIEF IN OPPOSITION

Respondents (collectively "Baltimore") urge that the petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit, entered 13 November 1996, be denied for the reasons set forth below.

STATEMENT

A. The Ordinance

All that was before the lower courts, and all that is before this Court, is Baltimore City Ordinance 288 (1994) (the "ordinance"). App., 17a-18a. Petitioners' reference to a "subsequently enacted" ordinance, Pet., 5, which was not mentioned in their complaints nor considered by the courts below, is improper and unavailing.

B. The District Court Proceedings

The basis for the lower courts' treatment of Petitioners' complaints as raising only a facial challenge to the ordinance is set forth in the opinion of the court of appeals in *Anheuser-Busch I* App., 37a-38a. As the Fourth Circuit observed, "as-applied review of the ordinance must await an actual or threatened enforcement of the ordinance against a particular billboard." App., 39a.

C. The Fourth Circuit's Initial Decision (*Anheuser-Busch I*)

Petitioners assert that the Fourth Circuit "refus[ed] to engage in judicial review" in *Anheuser-Busch I*. Pet., 7. To the contrary, the court had before it the entire legislative record supporting the ordinance, including research studies showing a definite correlation between alcohol advertising and underage drinking.[1] The court made an assessment of whether the legislative record demonstrated that the ordinance will directly and materially reduce underage drinking, and the court concluded that it will.

> The proper standard for approval must involve an *assessment* of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, *we* conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

App., 32a (emphasis added).[2]

Furthermore, the judicial review undertaken by the court included an assessment of Baltimore's assertion (independent of the record evidence) that a reduction of publicly visible promotional advertising of alcohol will

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[1] The court's summarization of the legislative record is set forth in App., 19a-21a and 35a-36a.

[2] Similarly, in an earlier part of its opinion, the court, relying on *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), stated that "[i]f it *appears to the court* that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met." App., 25a (emphasis added).

reduce demand for alcohol among minors as matter of law. The court relied on *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 569 (1980), and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), for its conclusion that Baltimore sufficiently demonstrated its ordinance will directly advance its purpose. App., 29a-31a.[3]

Petitioners also assert that "the court found that Baltimore had no burden to explain its rejection of" non-speech related alternatives to the ordinance. Pet., 9. To the contrary, what the court said was this:

> Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. [*Central Hudson,*] 447 U.S. at 556, 100 S. Ct. at 2343. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. See *Florida Bar*, ___ U.S. at ___, 115 S. Ct. at 2375-77; *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478, 109 S. Ct. 3028, 3033-34, 106 L.Ed.2d. 388 (1989).

App., 33a.

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[3] In so holding, the court expressly aligned itself with two other courts of appeal "in holding that restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking." App., 32a-33a (following *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 750 (5th Cir. 1983) (en banc), *cert denied*, 467 U.S. 1259 (1984), and *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984).

The possibility of increasing enforcement of criminal laws against underage drinking, or of a government educational campaign against underage drinking, did not, in the court's view, render Baltimore's ordinance more burdensome than necessary to achieve its purpose. Rather, citing *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), the court observed that "[t]hrough outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message." App., 36a. Because Baltimore's concern . . . is that advertising will unduly promote alcohol consumption despite known dangers," the court concluded the ordinance did not restrict speech unnecessarily. App., 35a (quoting *Dunagin, supra*, 718 F.2d at 751). And, the court held in rejecting the fourth prong challenge, the ordinance "still permits adults to receive advertising messages and information from signs in commercial areas in the City and through the numerous other media through which adults are constantly exposed." App., 36a.

D. The Fourth Circuit's Decision on Remand (*Anheuser-Busch II*)

On remand from this Court, the court of appeals reconsidered the case in light of *44 Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). The court found that case not to have displaced the *Central Hudson* test under which *Anheuser-Busch I* was decided, and, furthermore, that *44 Liquormart* was distinguishable. The court, therefore, readopted its decision in *Anheuser-Busch I*. App., 3a.

In readopting its decision in *Anheuser-Busch I*, however, the court stated the following regarding *Posadas de*

Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986):

> In readopting our opinion, we do not continue to rely on *Posadas* . . . in view of the doubt placed on that opinion by a majority of the Court in *44 Liquormart* . . . . Because we do not blindly defer to the legislative rationale, but rather agree with it based on our own independent conclusion about the fit between [the] legislative objective and the regulation used to achieve that objective, the holding in *Posadas* is not necessary to our opinions upholding Baltimore City's ordinance.

App., 3a.

The court characterized its decision in *Anheuser-Busch I* as having involved "our own independent assessment . . . [of] the reasonableness of Baltimore City's legislative finding that there is a 'definite correlation between alcoholic beverage advertising and underage drinking.' " App., 4a (quoting *Anheuser Busch I*, App., 31a).

The court observed that its holding in *Anheuser-Busch I* on the fourth prong of the *Central Hudson* test had been "[b]ased on our close look at Baltimore's asserted goal and the billboard zoning used to achieve that objective." App., 4a. The court found *44 Liquormart* distinguishable on the facts. Unlike the blanket ban on price advertising involved there, the court observed, this case involves a limited restriction which "does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser Busch and its competitors." App., 7a.

Furthermore, the court observed in distinguishing *44 Liquormart*, enactment of Baltimore's ordinance was not an attempt "to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the *44 Liquormart* Court feared was the case with Rhode Island." App., 7a. Since underage drinking is illegal in Baltimore, the ordinance "reinforce[s] the democratic decisionmaking mechanism's conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children's maturation." App., 8a.

REASONS FOR DENYING THE WRIT

THERE IS NEITHER APPARENT NOR ACTUAL CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND THIS COURT'S DECISIONS

This case presents no compelling reason for review by this Court. The Fourth Circuit's decision was a correct application of the standards set forth in *Central Hudson* and its progeny, and was decided with faithful reference to *44 Liquormart*.

A. The *Central Hudson* Third Prong

Rather than conflicting with decisions of this Court, the decision of the Fourth Circuit is quite apparently consistent with them. The lower court upheld the ordinance under the third prong of the *Central Hudson* test because "[a]fter our own independent assessment, we

recognized the reasonableness of Baltimore's legislative finding that there is a 'definite correlation between alcohol beverage advertising and underage drinking.' " App., 4a. That holding is supported by a host of holdings and pronouncements from this Court. *See, Central Hudson,* 447 U.S. at 569 (third prong satisfied based on common sense); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509 (1981) (same) (plurality); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 666 (1994) (judicial obligation to exercise independent judgment when First Amendment rights are implicated is to assure itself that government adduces "either empirical support or at least sound reasoning on behalf of its measures") (citation omitted); *Edenfield v. Fane,* 507 U.S. 761 (1993) (citing with approval *Central Hudson,* 447 U.S. at 569 (*supra*)); *Edge,* 509 U.S. at 428 (third prong satisfied based on common sense); *Florida Bar v. Went For It, Inc.,* 115 S. Ct. at 2371, 2378 (1995) (empirical support justifying speech restrictions need not be "accompanied by a surfeit of background information," and speech restrictions may be upheld based on "simple common sense") (citation omitted); *44 Liquormart,* 116 S. Ct. at 1511 (Part VI) (Stevens, J., concurring) (commercial speech doctrine "recognize[s] some room for the exercise of legislative judgment").

In view of the demonstration which Baltimore made in the lower courts in support of its ordinance, and in view of the Fourth Circuit's "own independent assessment" of that demonstration, App., 4a, if the Fourth

Circuit had done anything other than uphold the ordinance under the third prong of the *Central Hudson* test then its decision would have been directly in conflict with the decisions of this Court.

Baltimore met its burden under the *Central Hudson* third prong with both empirical support and sound reasoning. This Court has recently held that restrictions on commercial speech may be justified based on "simple common sense." *Florida Bar,* 115 S. Ct. at 2378. The common sense link between alcohol advertising on billboards and consumption of alcohol by minors is self apparent. *Dunigan,* 718 F.2d at 750. *See also, Cal-Almond, Inc. v. United States Department of Agriculture,* 14 F.3d 429, 439 (9th Cir. 1993) ("The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised.").

Cases relied upon by Petitioners, such as *Edenfield; City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993); *Ibanez v. Florida Dept. of Business and Professional Regulation,* 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.,* 115 S. Ct. 1585 (1995); and *44 Liquormart,* are all distinguishable from the instant case. Those cases did not involve, as this one does, a logical or common sense link between the speech restraint and the governmental interest sought to be advanced. In those cases, without evidence compensating for the lack of a logical or common sense link between the means and the ends, the efficacy of the speech restraint could be defended with nothing more than speculation.

This case does not provide a vehicle for re-examination of this Court's assumption, as a matter of law, that

advertising increases consumption. Baltimore relied on more than judicial notice and common sense to satisfy its burden; it relied on evidence placed before the court. The Fourth Circuit sustained Baltimore's law based on a legislative record containing much more than tidbits of evidence or speculation. The studies placed before the court below demonstrate that advertising of the type restricted by Baltimore's ordinance plays a unique and significant role in stimulating illegal consumption of alcohol by minors. As the Fourth Circuit observed:

> In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the " 'overwhelming majority' of

> research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

App., 20a.

Although this Court would find the legislative record supporting Baltimore's ordinance sufficient to satisfy Baltimore's burden under *Central Hudson*, it would not thereby clarify the law. *Cf., Florida Bar*, 115 S. Ct. at 2378 ("we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, review of the determination of the lower court as to the sufficiency of the evidence adduced by Baltimore in support of its ordinance would not, respondents respectfully submit, be a prudent use of this Court's certiorari jurisdiction.

Petitioners treat the Fourth Circuit's decision as aberrant because it affirmed dismissal of their complaints pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners do not dispute, of course, that the legislative record supporting Baltimore's ordinance was properly before the district

court and could be considered by that court in accordance with Rule 12(b)(6). *See* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* §1357 (1990) (in deciding Rule 12(b)(6) motions courts may consider matters of public record).

The district court's recourse to the legislative record supporting Baltimore's ordinance was no different from this Court's recourse (on a summary judgment motion) to the Bar study supporting the speech restraint upheld in *Florida Bar.* In *Florida Bar,* as in this case, once the reviewing court satisfied itself that the legislative record contained empirical support demonstrating the restraint would directly advance the government's purpose, the judicial inquiry under *Central Hudson's* third prong was concluded. *Cf., Turner Broadcasting,* 512 U.S. at 666 (judicial obligation to exercise independent judgment in First Amendment cases is not a license for court to reweigh the evidence *de novo.*).

The record in *Central Hudson* was far less factually developed than the record in the instant case. The Court determined, however, based on common sense, that the state's interest in energy conservation was directly advanced by a regulation prohibiting advertising that promoted the use of electricity. 447 U.S. at 569. As this Court observed, "the Commission adopted the restriction because it was *deemed likely* to 'result in some dampening of unnecessary growth' in energy consumption." *Id.* at 560 (quoting *Consolidated Edison Co. v. Public Service Comm'n.*, 47 NY2d 94, 101, 390 NE2d 749, 752 (1979)) (emphasis added). In deciding that the advertising restriction would lower demand for electricity, this Court

pointed to no record evidence, and, indeed, there was no such evidence to support the regulation.

B. The *Central Hudson* Fourth Prong

The final question under *Central Hudson* is whether the regulation is "more extensive than is necessary to serve [the governmental] interest." 447 U.S. at 566. In *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), this Court held squarely that this inquiry does not amount to a "least restrictive means" test. Instead, this Court's decisions require

> a " 'fit' between the [government's] ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served [ ]"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (citations omitted).

The Court has elaborated on this approach in subsequent decisions, but it has never retreated from *Fox's* firm rejection of a "least restrictive means" test. To the contrary, it has repeatedly reaffirmed that holding. *See, Edge*, 509 U.S. at 429-30, *Discovery Network*, 507 U.S. 410, 416-17 nn. 12-13 (1993); *Florida Bar*, 115 S. Ct. at 2380. Accordingly, a commercial speech restriction will fail the narrow-tailoring requirement only if it "burden[s] *substantially* more speech than necessary." *Edge*, 509 U.S. at

430 (emphasis added). The existence of "numerous and obvious less-restrictive alternatives" is a "relevant consideration," although not necessarily a dispositive one, in assessing the fit between the government's regulatory means and ends. *Discovery Network*, 507 U.S. at 417 n.13. Conversely, the continued availability of alternative channels to communicate the regulated speech weighs in favor of sustaining the regulation. *See, Florida Bar*, 115 S. Ct. at 2380-2381.[4]

Petitioners assert that the Fourth Circuit's "decision clashes most starkly with this Court's conclusion in *44 Liquormart* that the fourth prong was not satisfied because, like Baltimore here, Rhode Island had not first attempted to reduce abusive drinking by adopting the alternatives of educational programs and limiting access to alcohol beverages." Pet., 20a. Petitioners' argument

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[4] Petitioners mischaracterize when they assert that "[t]his Court has held repeatedly that the fourth prong *is not* met if there are 'obvious less-burdensome alternatives to the restriction on commercial speech.' " Pet., 19 (emphasis added). *See, Discovery Network*, 507 U.S. at 113 n. 13 (presence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is *"a relevant consideration* in determining whether the 'fit' between ends and means is reasonable") (emphasis added); *Florida Bar*, 115 S. Ct. at 2380 (same); *44 Liquormart*, 116 S. Ct. 1521 (O'Connor, J.) ("availability of less-burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends *may* be too imprecise to withstand First Amendment scrutiny") (emphasis added).

Thus, Petitioners have built their conflict argument upon a mistaken characterization of the standard which actually obtains under the fourth prong.

proceeds from a misunderstanding of the basis for this Court's holding in *44 Liquormart,* and, more fundamentally, disregards obvious differences between this case and *44 Liquormart.*

In *44 Liquormart* the Court held that Rhode Island had failed to make the requisite showing because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance." 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1521-1522 (O'Connor, J.). In particular, the Court relied on Rhode Island's authority to raise the price of liquor directly, either through price regulation or taxation. *Id.* at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J.). Justice Stevens also noted that another alternative, an educational campaign directed against liquor consumption, "might" prove to be more effective than Rhode Island's indirect attempt to reduce consumption by prohibiting price advertising. 116 S. Ct. at 1510. He did not, however, conclude that an educational campaign in fact would be more effective, nor did he suggest that a state must undertake such a campaign before it can engage in commercial speech regulation.

While *44 Liquormart* makes clear that the availability of effective non-speech related regulatory alternatives is relevant to the final prong of *Central Hudson,* the decision does not hold that the bare existence of such alternatives will always be dispositive. *Central Hudson* and its progeny have never required the government to exhaust all conceivable regulatory alternatives to commercial speech restrictions. Tellingly, in *Edge* the Court sustained the federal restriction on broadcast lottery advertising under the fourth prong of *Central Hudson* without requiring a

showing that educational campaigns against gambling had been undertaken or would be ineffectual. That holding in *Edge* survives *44 Liquormart*.

Rhode Island's unconstitutional price advertising ban proceeded from the misguided and paternalistic assumption that adults would use truthful commercial information unwisely. Baltimore's law, on the other hand, proceeds from the compelling interest which the City asserts in protecting children from advertising which induces them to consume a product that they are prohibited by law from consuming. Direct criminalization, however, has proven ineffective in curbing underage drinking. Baltimore's law was enacted in support of the government's unambiguous commitment (backed by the criminal law) to zero tolerance of underage drinking, whereas Rhode Island's law was enacted as an indirect way for the state to affect drinking behavior without unambiguously committing itself to reducing alcohol consumption.

It is entirely legitimate under the First Amendment for the government to act "paternalistically" in order to protect children. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996) (for First Amendment purposes, "the protection of children is a 'compelling interest' "); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); *Ginsburg v. New York*, 390 U.S. 629, 639-41 (1968) (same). As a result, the government may legitimately seek to protect children from the harmful effects of information that adults have a First Amendment right to see and hear. *See, e.g., Ginsburg*, 390 U.S. at 634-41 (state may prohibit sale of non-obscene materials to minors because "the

state has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' ").

The impact which Baltimore's ordinance has on the ability of adults to receive alcohol advertising is not constitutionally significant in view of the many alternative channels of communication left unrestricted by the ordinance. *Florida Bar,* 115 S. Ct. at 2380-2381; *44 Liquormart,* 116 S. Ct. at 1521 (O'Connor, J.). As observed by the Fourth Circuit, Baltimore's ordinance "does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors." App., 7a.

Nor, despite their citation to *Discovery Network,* can Petitioners sustain their argument that Baltimore's ordinance is unconstitutionally underinclusive. The ban on commercial newsracks in that case was struck down because such newsracks were no greater an eyesore than the non-commercial newsracks which were left unregulated, thus establishing that Cincinnati drew a distinction between commercial and non-commercial speech which bore no relationship whatsoever to the particular interest the City had asserted. 113 S. Ct. at 1508-1509. It is otherwise as to the distinction between outdoor advertising and the many other channels of communication which Baltimore's ordinance leaves free from restriction. Long ago this Court recognized that billboards are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation. *Packer Corp. v. Utah,* 285 U.S. at 110. It is the tendency of billboards to be immune from all attempts at parental supervision which motivated Baltimore to restrict billboards in particular.

Similarly, Petitioners' underinclusiveness argument, based on the ordinance's disparate treatment of various types of outdoor advertisements for alcohol (Pet., 21), is foreclosed by *Metromedia* and *Edge*. In *Metromedia*, San Diego's billboard ordinance was attacked as impermissably underinclusive because of its failure to ban on-site as well as off-site advertising. This Court squarely rejected that argument: "[W]hether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising." 453 U.S. at 511 (plurality opinion); *id.* at 551 (opinion of Stevens, J., concurring in part and dissenting in part).

Edge involved a federal statutory restriction barring radio broadcast of lottery advertisements by stations licensed in a non-lottery state. The purpose of the restriction was to protect state choice concerning lotteries. Edge Broadcasting Co. owned a station in North Carolina, a non-lottery state, but 92% of the station's audience was composed of residents from a populous city in nearby Virginia, a lottery state. Edge argued, and the lower courts held, that the advertising restriction was fatally underinclusive as applied to it because too much commercial speech about the Virginia lottery had been left unrestrained for the restriction to "directly advance" Congress' purpose. In rejecting that argument this Court held:

> We have no doubt that the fit in this case was a reasonable one. . . . [A]pplying the restriction to a broadcaster such as Edge directly advances

> the governmental interests. . . . *We think this would be the case even if it were true, which it is not, that applying the general statutory restriction to Edge, in isolation, would no more than marginally insulate the North Carolinians in the North Carolina counties served by Edge from hearing lottery ads.*

509 U.S. at 429-430 (emphasis added).

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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